UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

INTERSECTIONS INC. and NET ENFORCERS, INC.,	.	Civil Action No. 1:09cv597
Plaintiffs,	.	
vs.	.	Alexandria, Virginia
	.	March 4, 2011
JOSEPH C. LOOMIS and JENNI M. LOOMIS,	.	1:57 p.m.
Defendants.	.	

. . . . . .

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE THERESA CARROLL BUCHANAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	MICHELLE J. DICKINSON, ESQ. DLA Piper LLP (US) 6225 Smith Avenue Baltimore, MD 21209
FOR DEFENDANT JOSEPH C. LOOMIS:	TIMOTHY J. McEVOY, ESQ. Cameron McEvoy, PLLC 11325 Random Hills Road Suite 200 Fairfax, VA 22030
TRANSCRIBER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Fifth Floor 401 Courthouse Square Alexandria, VA 22314 (703)299-8595

(Pages 1 - 59)

(Proceedings recorded by electronic sound recording, transcript produced by computerized transcription.)

P R O C E E D I N G S

THE CLERK: Criminal Case No. 09-597, Intersections Inc., et al. v. Joseph C. Loomis, et al. Counsel, please state your names for the record.

MS. DICKINSON: Good afternoon, Your Honor. Michelle Dickinson for the plaintiffs.

THE COURT: Good afternoon.

MR. McEVOY: Good afternoon, Judge Buchanan.

THE COURT: Good morning -- good afternoon.

MR. McEVOY: Tim McEvoy, yes, for Mr. Loomis.

THE COURT: All right, I have granted just so you know the order for sealing that was agreed to, so this comes on the plaintiffs' several motions, and I've, I've read everything. Do you have anything to add to your motions?

MS. DICKINSON: Your Honor, did you want us to take them -- back up for a second. The fees, is that before the Court or --

THE COURT: Yes, it is, and, and I'll tell you right now that I'm going to take everything under consideration.

MS. DICKINSON: Okay.

THE COURT: I'm going to have to write a report and recommendation, but if there's anything that you want to address that was not in any of your briefs, go ahead.

MS. DICKINSON: So, Your Honor, if I may address each individually?

THE COURT: Sure, that's fine.

MS. DICKINSON: Thank you, Your Honor. And I'll try not to cough too much while I'm up here.

THE COURT: That's okay.

MS. DICKINSON: Or sniff too much.

THE COURT: Whatever you think you need to add.

MS. DICKINSON: Okay. Your Honor, in October -- as far as the motion to vacate the protective order, that's actually their motion. Do you want me to address that first? Do you -- or do you want me --

THE COURT: Just address it, you know, along with yours. I mean, I know what the issues are. I don't think it really matters who goes first.

MS. DICKINSON: Okay.

THE COURT: Okay.

MS. DICKINSON: All right. In October of 2009, Your Honor, we came before this Court for help. Joe Loomis was intimidating and harassing witnesses. He was harassing plaintiffs' employees and, frankly, counsel. This Court ordered Joe Loomis to stop. It ordered Loomis to stop contacting plaintiffs, their employees, and their witnesses.

Two weeks ago, we brought to this Court's attention what we had just learned, that Joe had -- Joe Loomis had been violating the protective order for several months. We have since learned that it's been for at least a year.

When we brought that to the attention of the Court, Mr. Loomis then filed a motion to vacate the protective order, and that's what we're speaking about now. The protective order is enforceable, there can be no question, but Mr. Loomis's motion to vacate the protective order is time-barred. Rule 72(a) provides a 14-day limit for filing any objections. Those objections would have gone to Judge Brinkema for review, and he did not do that.

Mr. Loomis is trying to right his wrongs, it seems, by asking this Court to overturn an order so that his conduct in violation of that order will not be sanctionable. The purpose of the protective order was to protect the witnesses of the plaintiffs' but also to protect the plaintiffs' ability to obtain evidence to prosecute their claims and their defenses against Joe Loomis's claims, and the purpose of rule 65(d) is twofold as well. It is to put the individual, in this case Mr. Loomis and his counsel who are no longer in the case, on notice of the exact contact -- conduct that he is prohibited from doing and then to create a record for the appellate court to the extent that -- in case that the order is, is appealed.

Even if this Court were to determine that the protective order needed modification for one reason or another, that would not make the protective order void. It would still be enforceable, and Mr. Loomis's transgressions and violations of the protective order would not just simply disappear.

The prohibited conduct under the protective order was

specific. There's no question that he knew that he could not contact current and former employees, and that's why he used a conduit to get in touch with one of his -- one of the former employees of NEI, Mr. Matt Leberer, and he told Matt LaVelle, who is one of his many attorneys in Arizona, that the protective order covered both Matt Leberer and Sheila Snyder, who are former employees of NEI.

Your Honor, I don't think there's any, any question amongst all of us as to what the purpose of the protective order was and who it was designed to keep him from contacting.

Now, Mr. Loomis contends that the protective order violates the First Amendment, specifically, his First Amendment right to association. He says that he's concerned that the protective order somehow makes it so that he cannot contact his family members. Well, if that was the case, then he was violating it in front of all of us when we were in your chambers with Jenni Loomis and when he was on the phone with his brother that day. So that, that just doesn't make any sense.

He also claims that it violates his First Amendment right to associate with what he says was a former girlfriend, although he testified in his deposition that they were never boyfriend and girlfriend, but that's neither here nor there, and another former friend.

Limiting his ability to contact two former friends, I don't think that our forefathers who created the First Amendment,

drafted the First Amendment, would have a problem with that in this case. It's not a forever prohibition. It was for the pendency of the case, and it was in order to protect the plaintiffs from having their evidence go away or somehow change form.

So I believe that -- we believe that this prohibition on conduct -- contact was narrowly tailored to serve an important governmental interest of protecting the sanctity of the legal system and this case. We believe that this Court should not entertain Joe Loomis's latest tack to get out of trouble. The protective order is enforceable, and the Court should deny his motion. That would be No. 1.

THE COURT: Okay.

MS. DICKINSON: We're also here, Your Honor, to talk about Joe Loomis's violation of the protective order. We call that our witness tampering motion for short. Apparently, motions or orders, court orders are meaningless to Joe Loomis. As I said in October of 2009, we came to this Court for help, and the Court ordered Joe Loomis to stop certain conduct.

We're back before the Court today because Mr. Loomis has wholly disregarded that order. He's been in direct contact with two of plaintiffs' witnesses: Sheila Snyder and Matt Leberer. Now, both of these witnesses have suffered intimidation at his hands. Sheila Snyder has gotten a, an injunction against harassment against him for threats that he made against her. Matt

Leberer sought the same type of injunction. So both of them have been intimidated by Joe Loomis, and Joe Loomis has filed a criminal complaint against Sheila Snyder for violating a protective order that he had against her.

Interestingly enough, a few days after the settlement conference, about a week or so after the settlement conference, those charges against Sheila Snyder were dismissed, January 29, 2010, and since then, Ms. Snyder says in her declaration she and Joe are friends again. We're not sure exactly how that happened since Joe Loomis should not be in contact with her according to the protective order.

Loomis has a -- Mr. Loomis has met with Sheila, is back in her life, has called and texted Mr. Leberer, has attempted to meet with him. He's entered into an indemnity agreement with both of them using Mr. LaVelle as a conduit, but still he entered into it. He signed the document and agreed to indemnify them in order to convince them not to talk with plaintiffs, with me specifically according to the declarations that are flying out there, and there certainly are a lot of them.

One could argue that Mr. Loomis's signing the indemnity agreement is not direct contact, but I would say that it, it violates the Court -- the spirit of the Court's protective order, but that doesn't really matter, Your Honor, because Joe Loomis absolutely clearly violated the protective order by being in contact, direct contact with, with these two witnesses.

And we also talked about how it is that Joe claims that the protective order is unenforceable, so I won't go back over that, but it, it seems clear to me, Your Honor, that Mr. Loomis has violated the protective order, that he needs to be sanctioned, that he is -- he seems incapable of following any orders that this Court issues, and that he is bordering on making, if he hasn't already, a mockery of this judicial system, and he can't be allowed to do that any longer.

No. 3, the long-awaited spoliation motion. Your Honor, Mr. Loomis has something to hide; there is no question about that. He has gone to great lengths to destroy evidence in this case. The evidence that he destroyed was on computers that contained Net Enforcers' business information. No dispute that that's what was on those computers.

There is a strong inference here that the data that he destroyed was relevant to the plaintiffs' claims in this case and the plaintiffs' defenses related to Joe Loomis's counterclaims. His scheme to destroy data started hours after he was suspended, and remember, his suspension is a subject of some of the claims in this case.

When I was trying to figure out how all of these pieces fit in, because frankly, it's hard for me to keep track of it, and I've been living this case for two years, I, I thought that we needed to look at a timeline, and I wished last night late that I had a huge board that I could put it all up on a timeline, because

it really is telling. I didn't have a huge board, so what I did was I made a little PowerPoint, and if I may?

THE COURT: Um-hum.

MS. DICKINSON: I thought it might be helpful for all of us.

The timeline, Your Honor, is telling. On October 20, 2008, Net Enforcers suspended Joe Loomis from his position as CEO of Net Enforcers. He was notified with a letter. He received the letter that day. The letter is in evidence. That letter put him on notice of the potential of a lawsuit, and it told him that he had a duty not to destroy evidence, to preserve all company data.

Mr. Loomis is prolific in computers. I think that's the right way to put it. He claims to be very good at using computers, and he uses a lot of them.

So what does he do that day? He's locked out of the computer system, the network system, by Net Enforcers. He has no way of getting on, and he's locked out of the offices, their secure offices, so he can't go in, so what he does is he contacts a young employee named Matt Leberer, and he coerces him to give him a -- his user name and password. Matt Leberer is an IT guy, he has admin credentials, so he can get into the server with his user name and password.

Mr. Loomis accesses the computer system remotely from his house.

THE COURT: That's all right, go ahead.

MS. DICKINSON: He accesses the computer system from his house, and then what he does is he starts deleting data out of files. As he's deleting the data, a gentleman named Chris Soyars, who's in Florida, a different state, he's an IT-type guy as well, sees the, the deletion going on and stops it.

The company is able to recover that data because they have this backup system that backs up the SVN server, not all the data on all the computers but on this specific server, so they don't lose that data, so everything's okay for the moment. He's deleted data, but that's not the subject of our spoliation motion, but it's important because it shows the beginning of the scheme.

So here's where we go from this scheme: Seven days later, Intersections sends a guy, an IT guy down to, to Net Enforcers in Arizona to make copies of the two hard drives on Joe Loomis's computer in the office that he's been locked out of. They want to see what's on there. They've started their investigation.

Joe Loomis finds out. He calls his brother, Chris Loomis, who works in the office down below, has him run upstairs, and while the IT guy is sitting in a conference room with his back to the glass door, waiting for somebody to let him into Joe's physical office to make the copies, Chris Loomis is allowed in by Sheila Snyder, one of the witnesses we've been -- we've talked about today. She lets him go in and take the computer tower.

He just takes -- I'm not real computer savvy, but he

just takes the CPU thing that has all the data on it. He doesn't take all the monitors and all that, and he runs out the door with the computer.

IT guy turns around, goes in to make a copy of the data, and it's gone, poof, never to be seen again.

Chris Loomis takes the computer back to Joe Loomis's house, his brother. Joe Loomis then within the next couple of days tells Matt Leberer, that young employee, he's got to get rid of the data. He has to figure out a way.

He says something to the extent of that he, that he can't smash the hard drives to destroy them or throw them away to keep Intersections from seeing the data, because they would find out, because you know what happens. You look on the computer with some forensic guy who knows what he's doing, and it shows when it was wiped clean, so he couldn't do that.

So this is what he decides to do: He, he tells Matt Leberer he's going to send that computer back to the manufacturer, Breezin Microsystems, and he's going to tell them the hard drives are broken, and he's going to have them swap out new hard drives. Well, Breezin Microsystems is going to get whatever they're going to do with the hard drives, but they'll be gone forever, and so will all of that data, and that's exactly what he does sort of, not exactly what he does.

He sends the, the computer back to Breezin Microsystems, but Breezin Microsystems doesn't, doesn't destroy the hard drives.

He does tell Breezin Microsystems that the hard drives are messed up. He says he needs a face lift on the computer, because it's not working right, and Breezin Microsystems tells him: You need to back up your data. Save the data.

He doesn't save the data. Breezin Microsystems then wipes the data off of the hard drives, doesn't replace them but wipes them and sends them back to him. Now, we know that because we have a declaration from Mark Hildebrandt who says, "This is exactly what I did."

Now, Joe Loomis got another declaration from him, this is like the war of declarations here, but it doesn't say anything that's concerning or any different really from that. I think what he says is that the graphics cards were bad. I don't know a whole lot about computers, but based on the people -- what I've heard from the people I've talked to, you don't have to wipe clean the hard drives in order to fix a graphics card, but even if you did, Joe Loomis could have backed up that data, but we know from what he told Matt Leberer -- sorry.

THE COURT: That's okay.

MS. DICKINSON: That, that he didn't want to back up the data. He was trying to destroy the data, and that's the thing that we have to keep our eye on in this story, which I'll make a little bit faster because I know I'm taking a long time, is it all kind of comes back to that point there.

He told an individual what his plan was, and from that

point on, he continued to destroy data at every turn. November 5, 2008, was -- I'm sorry, the day before he sent the computer back to Breezin Microsystems to have the data wiped out, he wiped out all the data on another desktop -- or a laptop computer, a laptop that he admittedly was using for NEI business.

We filed suit on May 27, 2009, in this court. We served document requests on August 4. Joe Loomis's responses were due about a month later. September 10, about a month later, what does he do? He wipes another laptop. He wipes all the data off of it. And then you know what happens from there: the harassment and the threats of jail.

This is a pretty compelling story here, Your Honor, and I could stand up here for another hour and talk about what all of this means, but I think we all know in this room that Joe Loomis was put on notice that he had to preserve data as early as October 20, 2008; that within hours from that point, he concocted and began this scheme to destroy evidence; and that he did destroy evidence; and Joe Loomis can argue until the cows come home that he backed up the data automatically, that now he's filed some new declaration within the last hour and a half, I guess --

THE COURT: I haven't seen that one.

MS. DICKINSON: I haven't seen it, either, but I had somebody call me and tell me basically what it said, that's, that's -- I believe what it says is that there was a, there was a system in place on the SVN server that was set up so that

certain -- and the language is specific -- certain of Joe Loomis's files were saved onto the SVN server, certain of them, so Joe Loomis will probably have us believe that those were all his business files, not his personal files.

Joe Loomis -- I'm not sure if I should say this or not, but Joe Loomis just can't be believed, Your Honor. The, the, the tie doesn't go to the winner; is that how that statement goes, that little saying? Joe Loomis can say he backed up data onto the USB drive and gave it to NEI's employees, but the fact of the matter is that we all know that that employee, as he says in his deposition testimony, picked and chose certain files and that that USB drive was created months before Joe Loomis was terminated.

His conduct speaks volumes. His statement to Matt Leberer is the key. Joe Loomis was trying to keep data away from NEI and Intersections, and that's exactly what he's done.

So we would ask this Court to issue sanctions against Joe Loomis in the form of a default judgment as to all of plaintiffs' claims and Joe Loomis's counterclaims, because coming into this courthouse and having a jury trial with Joe Loomis, well, I think we all know what that would be like.

THE COURT: All right, thank you, Ms. Dickinson.

Mr. McEvoy?

MR. McEVOY: Yes, Your Honor. And first of all, thank you for your attention to the papers and to hearing me out this afternoon. I do appreciate it.

THE COURT: Of course.

MR. McEVOY: And, you know, I will start by saying that about a year ago, I got a call from Ellis Bennett that the Court probably recalls from this case --

THE COURT: Right.

MR. McEVOY: -- indicating he needed a favor, that they had a conflict and trial would be in six weeks and, you know, it's going to be a challenge and, but I'm, you know, we're in a bind. It will be over --

THE COURT: Are you still friends with Mr. Bennett?

MR. McEVOY: We're still friends, yeah.

And, you know, I -- the reason that I stay in this sometimes stressful business is because I love what I do, and I really do love this court. I love the discipline, the professionalism, the ability to, to try cases. People would probably say you've got to be crazy to take this job as a general matter if you don't really like it or love it in fact.

So I said I would do it, and I'm fighting as best I can, Your Honor, to, to try to get that day in court, and I, I'd like to -- to the extent the record won't reflect it because it doesn't take photographs, Mr. Herich is -- Mr. Emil Herich, who this Honorable Court entered a disqualification order --

THE COURT: I remember.

MR. McEVOY: -- is here today, and we can get to him in a bit, but I think I can speak for him in saying that among other

things, as a sign of respect for the Court and its order to answer any questions that this Court may have --

THE COURT: I don't have questions.

MR. McEVOY: Okay.

THE COURT: I had understood that you wanted to present testimony.

MR. McEVOY: Well, yes.

THE COURT: If you want to do that, you can go right ahead.

MR. McEVOY: All right, all right. Well, I just -- I wanted to acknowledge his presence here for that purpose and perhaps among others. We'll see about the testimony, Your Honor, but -- and I'll get back to Mr. Herich shortly, but in the first instance, Your Honor, I would like to say that Ms. Dickinson closed by saying we, you know, suggesting that Mr. Loomis being in court would be an issue, but, you know, he did testify in front of this Court, I guess, back in August or maybe it was September, and, you know, he comported himself reasonably on the stand, so I don't -- I think of -- and I think about the cases I've had with Judge Brinkema, and I think knowing her and knowing the people involved in various difficult cases that she's had and knowing those lawyers and on both sides from U.S. attorneys and otherwise from civil lawyers, if anybody's prepared to roll up their sleeves and give testimony the weight that, in light of all the things that have been alleged, that it deserves on one side or the other,

there's no doubt that Judge Brinkema is, is the person that would -- probably most if not all members of the bar would think of as being perhaps the top qualified to do that.

So I think that we've got to keep -- and, and Ms. Roth, who's, who's with us today, pointed out a couple weeks ago that the stock purchase agreement that is at issue in this case has a jury waiver clause as to the bulk of the claims in the case, and we haven't resolved the stipulation as to whether or not the jury waiver is appropriate, but if it were to come down that way, Judge Brinkema would, would hear the evidence or -- some or all or -- most or all of the evidence herself. I think that's a factor here.

Another thing I want to tell the Court before I talk about things that are not in my papers is that -- and it's as an aside, I've had discussions and Mr. Herich, who is approved bankruptcy counsel in Arizona, has had discussions or had discussions with Kevin Kobbe, who is Ms. Dickinson's partner, and I told Mr. Kobbe I was going to say this today and I pass this on to Ms. Dickinson that -- what?

(Discussion between counsel off the record.)

MR. McEVOY: My understanding is that there's going to be a meeting between the parties next week, and I just, I want the Court to understand that, in Phoenix.

As to the allegations that Ms. Dickinson has raised, I think the number one thing that has to be said, and as I, as I --

what I said at the outset of this soliloquy was linked to this, that the law favors a trial on the merits clearly. That's what this courtroom is all about and why we're here, and the Fourth Circuit, the Supreme Court, everybody recognizes that, that dismissing a case for, for anything other than a trial on the merits is an extremely rare and harsh sanction.

And I want to talk at the outset and highlight actually just the fact that there really, there was -- the timeline that Ms. Dickinson handed up is very helpful, because it shows, in fact, it underlines the point that the plaintiffs knew about this alleged spoliation literally from the day that Mr. Loomis got suspended, because within 24 hours, they were accusing him of, of tampering with the server. A week later, they said that his brother came in and, and ran off with the tower computer, which in our papers we show Mr. Loomis owned it and it was excluded from the stock purchase agreement. Then there were these laptop issues, but the last of the two laptops was returned in September of 2009. All anybody had to do was turn it on, and according to them, everything had been removed from it, just turn it on and you'd see there was nothing there.

So three or four months before discovery closed, they knew and had everything they needed to know in order to bring a spoliation motion, and my problem as an advocate and I think one advantage I do have over Mr. Bennett or anybody else who was in this case before me is that trying -- not having lived through the

case like this Honorable Court or Ms. Dickinson, to look at this as a matter of law and to say that to bring a motion for sanctions, especially where you seek a default judgment, after discovery closes, 15 months after the first alleged act of spoliation, three or four months after you knew everything that you wound up putting in your spoliation motion, and therefore, in cancelling Mr. Leberer's deposition that was, I believe, scheduled for the end of November, before the discovery period closed, knowing that you were going to file -- you had already obtained a declaration from him to support a spoliation motion, it does two things.

No. 1, it suggests that you, as Madalyn Behneman said in what they say is a draft memorandum, they, in fact, believe they did recover all the information at issue here. It really begs the question of do they really believe what they're saying, that any information was lost.

Mr. Loomis says no, the delay speaks incredible volumes, especially the delay in filing, not even announcing it until after discovery closed. What does that say?

Ms. Dickinson said that there was a war of the declarations. When I was a young man, I started practicing at Venable, and one of my early mentors was, was Bill Dolan, who the Court probably knows, and another gentleman across, wound up in Baltimore cross-town from where Ms. Dickinson practices now, and I handled a case with a guy named Ron Taylor called, I think it's

called *Evans v. Technology Applications & Services Company*.

I left and became a prosecutor, but in the meantime, it went to the Fourth Circuit, and I think it's one of the leading cases now, and I regret I don't have the cite, but it stands for the proposition that summary judgment -- and I understand we're not in summary judgment here, but we're in a proceeding like summary judgment -- should almost never be granted without the opportunity for discovery, and that, that principle applies to this situation, Your Honor, because what I -- in thinking about this, what this attempt to get a default judgment means, it's not unlike a party that came in and after the discovery period had closed, they knew they were -- they had this -- they had some other claim that wasn't in the complaint. They knew it, and they had all the information related to it through the whole discovery period.

After discovery closes, they file a, a motion for summary judgment based on a claim that wasn't in the complaint, and they seek basically to, to short-circuit the trial process in that regard, and they said, well, we don't need discovery for that.

And Ms. Dickinson said we've got a war --

THE COURT: I really don't understand the analogy.

MR. McEVOY: Well, because in, in a case of summary judgment, you're seeing to get a judgment to end the case, right? And they're seeking --

THE COURT: No, I understand that, but this is not a new issue, and, in fact, his destruction of evidence had been an issue all during discovery.

MR. McEVOY: Well, except for the fact that they didn't say -- they could have filed this spoliation motion in time for people to take discovery related to, for example, Mr. Soyars' declaration. We've had all of these disputes about Mr. Leberer. I would love to take Mr. Leberer's deposition. I've tried to call the gentleman. He won't call me back.

I mean, I'd love to take the corporate deposition not to, not to, not to take, just take a deposition, but because we say that the server logs, there's a -- there is clearly genuine disputes about material facts related to whether the server logs would support Mr. Loomis's testimony. They say no; Mr. Loomis says yes. You know, who knew what?

Look, these are good lawyers over here; that's clear. The DLA folks, they've worded careful declarations.

THE COURT: You know, I really have a hard time understanding why the issue as to whether or not these servers were being backed up, as Mr. Loomis claims, has anything to do with what's presented before me of his -- of the evidence of his intentional destruction of evidence. Whether they were backed up or not backed up is really not the issue. The issue is his actions.

MR. McEVOY: I, I think the point -- I'll try to put it

succinctly like this, Your Honor: If I have, if I have -- I've got all these notebooks on my desk here.

THE COURT: Right, okay. So you think that it's all right to throw those notebooks away because you think that there's a copy -- there might be -- you think maybe there's a copy somewhere else.

MR. McEVOY: Well, he -- I'm sorry.

THE COURT: And even though you've been told by the Court or by, you know, your opposing counsel when they notified you of the possibility of the lawsuit that you had a duty to preserve all evidence, that you thought it would be okay to do that just because there might be another copy of it.

MR. McEVOY: Well --

THE COURT: I don't, I don't understand this argument.

MR. McEVOY: Mr. Loomis obviously isn't a lawyer. He got a letter that said, "You are suspended. You have a duty to keep company, company records."

Remember that Mr. Loomis has also said that there were discrete and highly confidential photographs, for example, his estate documents, things like that, on the system. He's also said that he -- it's not that things might have been backed up. His assertion is that things were backed up, and that's why I say, look, if I had been able to take discovery of these people and --

THE COURT: I don't know what difference it would make whether it was backed up or not. That's my point.

MR. McEVOY: Well --

THE COURT: And, you know, your right to take discovery as to whether or not the servers were backed up is immaterial.

MR. McEVOY: Except there's no prejudice if the information is there. And they have a draft report from Madalyn Behneman that says, "We recovered everything," which explains why they waited 15 months to do anything about this.

THE COURT: They recovered what was on there but not what was on his laptops. There's a difference. Not everything on the laptop would necessarily be backed up on the server; isn't that correct?

MR. McEVOY: I, I --

THE COURT: And I've got to admit that my understanding of computers is somewhat limited, but just -- the only thing that I would guess would be backed up on the server from a laptop would be something that you are hooked into the system to create, like an e-mail that's hooked into their e-mail system to create or a word processing document perhaps that is hooked into the main word processing program for the company. I mean, you have to be hooked in through their Web site in order for it to be backed up by their computers, I would think, and you can correct me if I'm wrong.

So if you create something else on your laptop that's not going through the servers of the, of the company, it would not be backed up. If you have a separate e-mail account that doesn't go through the servers, it would not be backed up. If you have

your own word processing program that's not going through the server of the computer, it would not be backed up. If you have your other documents that you've scanned into your computer, they wouldn't necessarily be backed up.

So there's a big difference here. We've -- I mean, really isn't the issue that they don't know what's on or what was on the laptops that was not going through the company servers?

MR. McEVOY: Yes. It's, it's clearly not profitable to argue, and I don't want to, so I think I can --

THE COURT: I know. I mean, I want to understand. If I'm wrong -- is that wrong? That's my understanding of the way this sort of thing works.

MR. McEVOY: I'll tell you my understanding, and maybe we'll see if we're speaking the same language.

THE COURT: Okay.

MR. McEVOY: My understanding -- and I'm not a computer professional, either, but the Court, as a general matter, that you're correct.

THE COURT: Okay.

MR. McEVOY: That it's theoretically possible, depending on how you configure a system, that --

THE COURT: Not theoretically.

MR. McEVOY: Well, that if you configure -- depending on how you configure your system and where you keep your information, that some information can be committed to a server and some

information isn't or couldn't or, or wouldn't necessarily be when you go through this backup process.

That having been said, Mr. Loomis's position is that all of this information was kept in these two folders, I think one was called Joe, I don't remember the names of them, including these compromising or highly personal photographs, for example, and estate documents, and that all of these things were backed up. I mean, that's where the dispute of fact is, and --

THE COURT: How do they know whether it was backed up or not? Because they never had a chance to see what was on there.

MR. McEVOY: Yeah. Well, there are two things about that, Your Honor, and I do have the declaration which I just recently received from a guy named Zack Gilburd I believe is how you pronounce his name. Mr. Gilburd says that there was something called a batch file program that would automatically back up the tower computer anyway. He doesn't speak to the two laptops.

THE COURT: Right.

MR. McEVOY: Mr. Loomis's testimony is that every day when he would log into the computer, that he would commit --

THE COURT: Why would you bother stealing a tower if everything is being backed up?

MR. McEVOY: Mr. --

THE COURT: Why would you bother?

MR. McEVOY: Well, remember, there was what I, I can only say was a highly regrettable incident involving Candess

Hunter with the threat against Ms. Dickinson that had its genesis in a dispute about people holding a computer too long.

Mr. Loomis --

THE COURT: Don't forget Mr. Loomis is the one who filed the criminal complaint or at least was said to have filed a criminal complaint.

MR. McEVOY: I think -- I understand Mr. --

THE COURT: Or went to the police station and swore out a warrant. Yeah, I don't know what the heck it was he did --

MR. McEVOY: Right.

THE COURT: -- but Mr. Loomis is the one who did that, not his attorney.

MR. McEVOY: Well, when I say "right," I'm just saying I understand that's what the dispute is. I can't -- I'm not going to sit here and try to make representations about that. I wasn't involved in the case at that time, and I don't think technically that's why we're here right now.

I'm just saying that my understanding is that the, that the tower computer had a batch program that would back it up. Mr. Loomis contends as to all of his computers that --

THE COURT: Then why would he bother stealing it?

MR. McEVOY: Because he was concerned that they were going to hold on to it and that, you know, he wanted to take it home and set it up because he needed a computer.

And I spoke to this guy, Mark Hildebrandt -- both sides

have put in declarations from Mr. Hildebrandt. Mr. Hildebrandt has from what I could tell clearly no axe to grind. I mean, he apparently has talked to DLA Piper; he talked to me. He says that there was a legitimate problem with the tower computer. I mean, he -- that -- well --

THE COURT: So it's okay for him to steal it?

MR. McEVOY: Well --

THE COURT: I don't understand this.

MR. McEVOY: Well, but it was, it was Mr. Loomis's computer, though. It was --

THE COURT: I know, but, you know.

MR. McEVOY: I mean, they're telling him, hey, you're suspended, you're out of here basically, right? And we, we know there was a dispute later about the laptop, so, I mean, in hindsight, he had a right to his -- he had a right to his computer. I don't understand how they can say they had a right to detain his computer, and if Mr. Loomis believed that everything was backed up, as he says --

THE COURT: So he happened to have someone come in and steal it just at the moment that someone was about to copy the hard drive. I mean, he didn't have someone take it earlier. It was only when he found out someone came from headquarters about to copy the hard drive that he thought it would be prudent to steal it right from behind his back.

MR. McEVOY: Well, you know, respectfully, Your Honor, I

have to vehemently disagree with the characterization of stealing. I don't think you can steal your own property.

THE COURT: Okay. Sneak in and take.

MR. McEVOY: Well -- and I, I don't know what -- I think Mr. Loomis would say that he believed that his computer could be detained for an indeterminate amount of time, and he wanted his computer at home because --

THE COURT: Yeah.

MR. McEVOY: -- apparently he was being fired, and he wanted to, needed to potentially make another living or do whatever --

THE COURT: Gosh, he had a lot of money from the sale of his stock. I would think he could have afforded to go out and buy one.

MR. McEVOY: Well, I also think it's, it's difficult, Your Honor, to be -- to put one's self in the position of getting fired, and, you know, things happen quickly.

THE COURT: Okay.

MR. McEVOY: So -- but I think I've answered the basic -- to sum it up, my understanding --

THE COURT: I just wanted to make sure that my understanding of how, of, of how it is that other data could have been on the laptop was correct, and you've agreed with that.

MR. McEVOY: I think, I think we've said in our papers even, Your Honor, that there's a question of we don't know what we

don't know.

THE COURT: Exactly.

MR. McEVOY: And there's a -- yes. We don't know what we don't know, but there's also a dispute. Mr. Loomis says you do know what you know, and they say no, you don't.

THE COURT: All right.

MR. McEVOY: So that's the nub of it.

THE COURT: Okay.

MR. McEVOY: And that's, that's my position about why this can't be decided as a matter of law simply on a war of declarations, and I'm not going to -- I don't need to belabor that further --

THE COURT: Okay.

MR. McEVOY: -- but that was my analogy to the *Evans* case earlier.

Excuse me one second. I'm trying to not discuss things I've already discussed.

THE COURT: Go ahead.

MR. McEVOY: So I think, Your Honor, too, and I, I would ask the Court to look at Ms. Behneman's report, which they've tried to say is a draft. The plaintiffs say themselves they believe they had recovered everything, and I, and I still have to go back to the fact that Ms. Behneman said that and we had this long delay before, I mean --

THE COURT: That they recovered everything that was on

the server.

MR. McEVOY: I think, well, as I understand it, recovered everything, all the data and information.

THE COURT: On the server.

MR. McEVOY: Well, my understanding is to the contrary. I mean --

THE COURT: How would they have gotten other data that was not on the server?

MR. McEVOY: Well, I apologize to you, yes, in the sense that, that all of the data from the various, like, the various computers were the tentacles, if you will, and the server is the, you know, octopus or what have you, the core, you know, the center of it. So yes, it went all to the server; that's right.

THE COURT: So your argument is that they would have recovered or that they have recovered all of the documents that were on the server --

MR. McEVOY: Yes.

THE COURT: -- at one point.

MR. McEVOY: Yes, that's right.

THE COURT: Not other documents that were never on the server.

MR. McEVOY: And that they've never denied that they recovered, for example, all of these personal things like wills and personal photographs and things. I mean, why would Mr. Loomis put those, you know, why would those be on the server, those kinds

of things be on the server but other things that were highly personal or not company-oriented not be? That doesn't make sense.

I -- you know, so otherwise, Your Honor, I would rest on the papers, but I think as a matter of law, we are entitled to -- in summary, two points on this.

THE COURT: Okay.

MR. McEVOY: As a matter of law, this should have been brought before -- during the discovery period, when we could have deposed these people. They knew no later than September everything they needed to know about any of these computers, so a harsh sanction of any kind would be inappropriate, and we say no sanctions are appropriate, but particularly a default, which is what they're seeking.

The other thing is, Your Honor, the idea that they say they recovered everything on the server and we don't know what we don't know is not sufficient to warrant taking the, at least short-circuiting this from the trial process or from someone like Judge Brinkema if it's a bench trial. She can surely take that into account in weighing testimony and so forth. That's what, that's what courts do.

So that's my summary on the spoliation argument.

THE COURT: Okay.

MR. McEVOY: On the protective order issue, Your Honor, the -- you know, look, on October 30, 2009, and on the 23rd and somewhere in between, when the Court first read the papers that

were filed about this business of Candess Hunter or whoever it was at the HH&Y firm who threatened arrest, I understand why emotions were high. I've called that a gaffe in my papers. I've called it ridiculous. I'll call it a gaffe and ridiculous today, unacceptable, threatening to arrest somebody in a, in a case like that.

In fact, Mr. Herich, who's employed in the bankruptcy court, is in the process, as I understand it, of once the dust settles, bringing a malpractice action against the HH&Y firm. So I'm not here to even think about trying to defend something like that, but the order, the order and for reasons in my papers is among other things, Your Honor -- well, before I deal with the order itself, it's not true, it's absolutely not true that the failure to appeal that by prior counsel means that it's -- can't be rechallenged or challenged or looked at now, and the reason is this: because when this Honorable Court issues orders, sometimes people take appeals under Rule 72 to the district court. If they don't do -- when a district court issues an order in a case, that's the order on that subject in the case unless and until the district court at any point in the proceedings decides for -- by motion or sua sponte to modify it. Even if it goes to the Fourth Circuit and comes back on a mandate of some kind, the district court can always revisit its orders by motion or by -- or sua sponte.

What happens when this Honorable Court issues an order

and nobody appeals it is that this Honorable Court's order becomes the order of the district court as well. So the failure of prior counsel to appeal it doesn't mean that, that any order of a, of this Honorable Court that never gets appealed becomes unmodifiable even by someone like Judge Brinkema. It just means that this Court's order becomes the order of the court.

So the fact that they didn't appeal it just meant that this order became the order of the court, but it doesn't mean that you can find someone in contempt, for example, if the order doesn't in the case of Ms. Snyder and Mr. Leberer in particular rest on individualized findings instead of what we say and I think the record shows were these general proffers, and I think -- I'm not going to revisit what I said in the papers, but I am going to point out that what my, my, my opponents, my friends, colleagues in the bar have said in their papers, they've now argued that former employees are encompassed by this order, which how can that be?

THE COURT: Well, is there some reason if he was concerned or confused about this order that he didn't bring a motion for clarification or a motion to reconsider based on specific people that he was concerned about not being able to contact?

MR. McEVOY: I can't speak to why it wasn't appealed or why --

THE COURT: No, I'm not asking about the appeal. I'm

asking about a motion to clarify brought back before me that said, you know, we understand why you issued this order, but we're concerned about these specific people and our inability to contact these specific people, and here's why. That was never done, and is there any reason why that was never done?

MR. McEVOY: Well, there was, there was a stay for a long period of time, and I think when the stay wasn't --

THE COURT: Don't you think that, that perhaps you could have gotten permission to come back to court and ask for that?

MR. McEVOY: I think, I think certainly permission could have been sought; yes, I do.

THE COURT: Because permission was sought for -- and given for other motions, including, well, not including this --

MR. McEVOY: Yes.

THE COURT: -- but including the other motions.

MR. McEVOY: I think that's true, Your Honor, but it, but it doesn't speak to the issue of whether someone can be held in contempt on -- I mean, the order is what it is. It is, you know, and it either is enforceable or it isn't, and I'm comfortable that under all Fourth Circuit precedent, it's not for the reasons I've said in my papers.

And I want to say something about Mr. Loomis in this regard: Part of the reason that my, my other colleague here, Mr. Herich, has even been dragged into these papers is because Mr. Loomis was not running around contacting everyone possible

whether the order was enforceable or not. I mean, there's -- that's the thing. We have two people -- and by the way, I want to -- Ms. Snyder and Mr. Leberer, and I will say as to Ms. Snyder, there's a reference to her being a girlfriend. I specifically directed that that phrase not be in the final brief. I don't know how it --

THE COURT: I don't care whether she was a friend who was a girl or a girlfriend.

MR. McEVOY: But it was important to Mr. Loomis, so I wanted to bring that to your attention. I understand it's not an issue that's probably material here, but I did want to clarify that for his sake. That's on my office. So it shouldn't have been in the brief.

But Ms. Snyder is a close friend. Mr. Leberer was or is a close friend. They were all friends and, indeed, close friends throughout the period in question, have known each other for years.

So, you know, Mr. Loomis's alleged contacts with Mr. Leberer are one text message about some ski clothing and one voice mail about the same subject that he didn't respond to apparently. Ms. Snyder, it is what it is, and we can say that for Mr. Loomis, too: The papers came in, they said, oh, he's been in contact with Ms. Snyder. We didn't come in and say, well, it's -- you know, try to limit it just to what was alleged in the papers.

The Court was informed for better or for worse what

those contacts were, how long they had been going on, and that's now before the Court. That's not, that is not -- there was no attempt to minimize that. So that is what it is, and we also have, you know, we have all of these other people that are potentially subject to the order that clearly he -- nobody contacted at all or the contacts that did occur occurred through Mr. LaVelle or through Mr. Herich.

And briefly, I know I've said about -- something about both of those gentlemen in my papers, but, you know, to emphasize with respect to Mr. LaVelle, I mean, in light of the HH&Y incident, when I thought I was going to Arizona potentially to be involved in this case, it wasn't clear whether I would or not, but I called the guy and I talked to Mr. Lewis -- Mr. Smith of the Lewis & Roca firm, because there was no way I was going to get involved in a situation where there were attorneys running around threatening to arrest people. I didn't -- I don't want anything to do with that.

So I've talked to Mr. LaVelle. The guy is an upstanding, he's from an AB-rated firm. I have no doubt in my mind that he tried to be a professional and upstanding at all times.

My understanding of Mr. -- in working with Mr. Herich, too, I take umbrage at the things that have been said about him, because I can't, I can't get into privileged matters, but I can also represent at least to the extent that was in the papers, I

mean, real efforts -- he's admitted to practice in that court in what's the same case, and lines have been drawn, and there's been a real effort to, to hew to what's a relatively novel situation in terms of his not being involved here but he is involved out there. Even Ms. Dickinson's partner, Mr. Kobbe, has to deal with Mr. Herich all the time. It is what it is.

I have to deal with Mr. Herich because he's the lawyer there, just like Mr. Kobbe does, but in terms of the work product and things, my name is on it here and for good reason, and if anybody wants to look at my time sheets, you know I've worked very hard -- very, very hard to discharge my duties as counsel here.

THE COURT: And I believe you have, Mr. McEvoy.

MR. McEVOY: So with respect to Mr. Herich, you know, we went -- when I was in law school, there was Geoffrey Hazard, you know, he wrote our ethics textbook and probably maybe the Court's and a lot of people's, and he's a, he's a nice, knowledgeable guy. What we're faced with with the indemnification agreement that is the root of this alleged witness tampering is this: The plaintiffs have included as an exhibit with their papers a severance agreement that contractually requires Mr. Leberer and, I believe, Ms. Snyder to cooperate, whatever that means, and if they don't cooperate, they can be sued for breach -- in this litigation for five years, and if they don't cooperate, they can be sued and have to return their severance.

One can easily make the argument that that's

inappropriate, and especially someone in my shoes coming into the case after the fact and, okay, and forget about Candess Hunter, HH&Y, or whatever, we just look at that contract and compare it to the indemnification agreement, which by the way at the end says you can talk to anybody you want to, you know, we don't care if you testify or not, we have two instruments -- we have one instrument that says you must cooperate, or we're going to sue you. The other instrument says if you -- basically, don't worry about getting sued, because you'll be indemnified.

The evidence that's in the record shows that at least Mr. Leberer expressed legitimate concern as to whether he would be sued if he talked to Mr. Herich or Mr. LaVelle, and Mr. -- Professor Hazard has opined that this is a, within the acceptable range of professional choices that a lawyer had in these circumstances to put a witness at ease.

And the point to be made there is that I am not entitled to a particular version of anybody's testimony. The plaintiffs are not entitled to a particular version of anybody's testimony, and it's almost as if the plaintiffs because of these contracts and because of all the stuff that happened before in the case have taken the position they're entitled to a particular version of the truth, and that's just not the case.

They're entitled to whatever these folks are willing to say under oath, because that's on them, and, you know, I have spoken to Ms. Snyder, I'm not prohibited from doing that, and I

said, "Are you coming to trial? Are you willing to come to trial?"

She said, "Yes."

As far as I know, no one's ever suggested that Mr. Leberer is not willing to, quote-unquote, cooperate and come to trial. So, you know, whether we'd like it or not, Mr. Herich is the lawyer in Arizona. All the things that they say about him occurred in Arizona. He was trying to be -- and this case easily could have been tried in Arizona. Nobody knew, for example, in November whether, whether this case would, in fact, be tried in Arizona or be tried here. So to suggest that he was trying to make people disappear or go away, first of all, Mr. Kobbe could depose those people in their bankruptcy case today, so could Mr. Herich as far as I know, and at that time, the trial on the merits might have been in Arizona.

So to suggest that somebody believed that they were going to make somebody disappear when there was just as much of a chance that the case would be tried basically down the street just isn't -- doesn't ring true, and part of the reason Mr. Herich's here, and I don't at this point intend to have him testify but as I will proffer, is because he is extremely upset at the allegation that he was witness tampering.

That's frankly, I find that to be in the same league -- I mean, that's a, that's a crime. That's a pretty serious allegation, and Mr. Herich's got a 27-year history of not even

having been accused of ethical violations, and it's been extremely upsetting to him, and I don't need to put him on the stand to tell the Court that it's extremely upsetting, but I think we have Professor Hazard to say that that was a reasonable choice, and I think that's a side show, Your Honor. That whole thing is a side show, especially where Ms. Snyder -- and there's no evidence that Ms. Snyder, neither Ms. Snyder nor Mr. Leberer will, in fact, refuse to appear for trial.

All we're entitled to, all anybody is entitled to is for someone to put their hand on the Bible and swear or affirm or declare that they're going to tell the truth, and that's what it boils down to, and anybody -- I'll cross-examine all these people about these contracts, severance agreements, they'll cross-examine people about indemnification agreements, and Judge Brinkema will give it the weight that it deserves, and I'll be delighted with that.

In terms of the order, Your Honor, like I said, I think that, you know, the plaintiffs also say, well, of course, it didn't apply to some family members. Well, some family members were according to them plaintiffs' witnesses, so it's just --

THE COURT: Well, again, he could have asked for a clarification if he really and truly thought he couldn't talk to his family members. I mean, this is sort of ridiculous, isn't it? I can't quite buy the argument that because he thought it was too broad or because he thought it was imprecise, that therefore it

was, in effect, void and he could just go ahead and file it.

MR. McEVOY: Well, except, Your Honor, it still is what it is. It either is enforceable or it isn't. That's the threshold question. He can either be held in contempt or not, and there's a whole separate set of questions associated --

THE COURT: That's one issue --

MR. McEVOY: Yes.

THE COURT: -- but I'm having -- if I find perhaps that my order was validly issued and if Judge Brinkema thinks that it was validly issued, then how is that an excuse for him to violate it when -- I mean, how is his perception that it was too broad or, you know, or not enforceable license to violate it?

MR. McEVOY: Well, I would beg the Court, I mean, that's probably the right word, not to, not to -- my duty to be a zealous advocate requires me to argue, I think, correctly in this case that the order is not enforceable, but Mr. Loomis --

THE COURT: I know, but I'm asking you a question. Just humor me --

MR. McEVOY: Yes.

THE COURT: -- and say that it's enforceable.

How is it that Mr. Loomis thought it would be okay to violate it just because he had questions as to, as to its enforceability?

MR. McEVOY: I can't speak for why Mr. Loomis, other than knows that they're close friends with Ms. Snyder --

THE COURT: Okay.

MR. McEVOY: -- why they associated other than that they're close friends.

And look, we've acknowledged the contacts, Your Honor. If we, if we, if we assume that the order is valid --

THE COURT: And I understand you've got a tough job up there, Mr. McEvoy.

MR. McEVOY: And we acknowledged the contacts, but we also, we also hasten to point out again the whole reason Mr. Herich is even in this thing today in the courtroom is because he went and talked to other people, because Mr. Loomis otherwise, you know, wasn't running around talking to people, and I think that, that is a factor that should weigh in the Court's analysis. I mean, clearly, I'm sure that, that my colleagues from DLA Piper would have 30 declarations if Mr. Loomis was running around talking to all kinds of people.

I think -- and I think clearly, Your Honor, whatever the Court decides about the order and, and Ms. Snyder, Mr. Leberer -- and one text message in a voice mail about ski clothes is not, certainly not -- it's laughable to suggest that that would support by itself, you know, a default judgment.

And I think even if Ms. Snyder, given her nature as the close friend, is that sufficient to, to support the harsh sanctions that plaintiffs are seeking, or, you know, again, with -- when Judge Brinkema tries this case, for her to know all

these things and give it the weight that it deserves, whatever that may be.

I think I've -- I would also like to just say with Mr. Herich, you know, there is a legitimate question of law again that I have to raise and do and I think rightly so, the, the order that disqualified him during the period he was getting these declarations, Judge Brinkema, you know, we appealed, Your Honor, with all due respect.

THE COURT: Right.

MR. McEVOY: She said it was moot, and it was moot during a stay. And he's -- it wasn't like he wasn't legitimately employed by the bankruptcy court out there at the time. He was. And we've explained why all -- in his application for employment and they tried to disqualify him and it didn't work, a legitimate conflict of law. And he wasn't running around in Alexandria, you know, taking depositions or things like that. He was --

THE COURT: But it was contact related to this suit, not the bankruptcy.

MR. McEVOY: But, but the -- but if you look at the proof of claim that they filed in the Arizona court, it is this case. It -- literally, it's this case.

THE COURT: I see.

MR. McEVOY: And the claims that flow from it, there's no distinction, because remember, on November 8, they filed their amended proof of claim seeking 14 million for the same reasons

that they sued him here. It is this case. The declarations were obtained on the 12th of November. The case -- this case and this motion could be argued in Phoenix today had Judge Haines made a different ruling. So that's, that's a critical fact.

THE COURT: Okay.

MR. McEVOY: So, Your Honor, I don't, I don't think I have more to add than what's in the papers and what I've said today other than to just reiterate that, that, you know, clearly a trial on the merits is favored, and we -- you know, who knows what will happen with this case the next week or two, but, you know, there just isn't the evidence other than proffers, which we challenge, to support the type of relief that's being sought, and I'll get -- in closing, you know, when, when counsel has to make a, preserve an issue for appeal, for example, at trial, they have to -- and the court rules against someone who's trying to admit evidence, there are two ways to preserve it. You either have to put the evidence on outside the presence of the jury for the record, or you have to have an agreed-upon proffer.

THE COURT: Okay.

MR. McEVOY: And here they're proffering all kinds of things. I don't agree with them, and there 's no evidence.

THE COURT: What, what about their proffers exactly do you not agree with? He's admitted to the contact with Ms. Snyder and Mr. Leberer.

MR. McEVOY: Yes -- right.

THE COURT: Okay. And we agree that there could have been data on the laptops that was not backed up by the servers and --

MR. McEVOY: But Mr. Loomis denies it, but they say there could have been and --

THE COURT: Well, you agree that there could have been. I just asked you that a little while ago to make sure that our understanding of how these computers worked is the same, and that is that unless the laptop is going through the server to create data or download data, that there would be other data on a laptop that would not necessarily be backed up by a server.

MR. McEVOY: Well, I want -- if it was any laptop, but I want to be clear, Mr. Loomis says that his lap- -- all of the data on his laptops was backed up. I don't agree that his position is that it wasn't -- that wasn't the case. His position is that there was a batch server program that, that automatically backed up everything on his desktop.

THE COURT: If it went through the server. If it didn't go through the server and it was on the laptop, it wouldn't have been backed up.

MR. McEVOY: But he's saying -- but his position is that it did go through -- everything went through the server.

THE COURT: That's his position.

MR. McEVOY: That's his position; that's right.

THE COURT: But you agreed with me that if it did not go

through the server, it would not be backed up, correct?

MR. McEVOY: If, if the Court rejected his version of events --

THE COURT: No, I'm saying that he said that his information, the only information that he had on the computer went through the server. That could be. It might be; it might not be. We don't know because they never got to look at the, at the laptop.

My point is -- and I thought you agreed with me -- was that if there were other documents that did not go through the server, that did not go through, for instance, e-mail on the server, then we don't know -- then they would not have been backed up by the server, and if they were destroyed, we don't know.

MR. McEVOY: I think we added somewhat of a disconnect. What I'm saying is that if we went across the street to company XYZ and they had similar computers there, that they could be configured or, or, or someone could manually not commit everything to a server, that as a general matter in the world, that's a true statement.

I'm saying that Mr. Loomis says everything was committed to the server, and that's set forth in his declarations.

THE COURT: But we don't know because they never got a chance to see his laptop.

MR. McEVOY: Well, I certainly am not going to agree or acknowledge that Mr. Loomis isn't being forthright when he says

everything was.

THE COURT: Okay. I understand.

MR. McEVOY: I can't. I can't. I'm not going to.

THE COURT: That's Mr. Loomis's position.

MR. McEVOY: Yes.

THE COURT: Okay. I understand. And then so what else would you not agree with in their declarations?

MR. McEVOY: Well, Your Honor, I mean, there are all kinds of -- for example, back to the original protective order, all these lists of things that were -- that he did that were horrible, all that kind of stuff, it's all by way of -- it's always been by way of proffer.

THE COURT: Wait a minute. His attorney was here and admitted that they threatened counsel with being arrested if they stepped foot in the state.

MR. McEVOY: I exclude that. I exclude that. I'm just saying that there are many, many things in the current set of papers that Mr. Loomis allegedly did or didn't do that aren't backed up by an admission like the one Your, Your Honor just said.

THE COURT: What else is there exactly?

MR. McEVOY: Well, it's in their papers, Your Honor, and I can't -- I didn't commit that list to memory, but it's in --

THE COURT: Well, what is it specifically that he disputes?

MR. McEVOY: Your Honor, I'm -- I can't agree to, to --

for example, on the -- if you look at the motion to vacate protective order and the opposition thereto, they talk about the reasons why the protective order was granted, and there has --

THE COURT: I know why it was granted. I was here. I was the one who granted it.

MR. McEVOY: I know, Your Honor, but, for example, there were no particularized findings as to Ms. Snyder, no particularized findings as to Mr. Leberer or really anybody else other than the acknowledged threat against Ms. Dickinson for example. So I'm just saying as a general matter I can't, I can't agree --

THE COURT: Okay. That has to do with the protective order.

MR. McEVOY: Yes.

THE COURT: As to the motion for sanctions and as to the motion for sanctions for the intentional destruction of evidence, those two motions --

MR. McEVOY: Yes.

THE COURT: -- what in the declarations besides what we've just covered does he disagree with?

MR. McEVOY: Well, Your Honor, I, I think that's a tall order, because there's so many declarations, at this point for me to stand here and say I think it's encompassed by the papers --

THE COURT: Fine. I'll look back at the papers then and I'll --

MR. McEVOY: And what I've said -- and what I've said about, our colloquy about these servers and so forth.

THE COURT: Okay. I understand.

MR. McEVOY: I mean, I apologize to you, but there's so much there now.

THE COURT: I'll assume that whatever it is is covered in your briefs otherwise.

MR. McEVOY: And to the extent I haven't been able to specifically tell you as I stand here now.

THE COURT: I understand.

MR. McEVOY: All right.

THE COURT: And I didn't mean to put you on the spot.

MR. McEVOY: All right. Well, Your Honor, like I said at the outset, you know, Mr. Bennett called me. I thought I was getting involved in a trial on the merits. You know, I think that a trial on the merits is still warranted.

The Court will do what it's going to do. You know, we'll see how the thing plays out, but, but it's -- for the reasons I've stated and especially with my colleagues, you know, on both sides of the table but in particular I feel for Mr. Herich, I don't feel that these allegations of misconduct are warranted at all, and not with Mr. LaVelle, either. I appreciate your time today and --

THE COURT: Okay. Thank you, Mr. McEvoy.

MR. McEVOY: Yes, thank you.

THE COURT: Did you have anything to add, Ms. Dickinson?

MS. DICKINSON: I do, Your Honor. I'd just like to clarify a few things.

THE COURT: Okay.

MS. DICKINSON: Your Honor, when I said that trial would be -- I'm not sure exactly what I said, but what I intended to say was that trial would be somewhat of a circus if we were here before the Court with Mr. Loomis and a jury, I didn't mean because he would be crazy on the stand. I meant because Mr. Loomis can't follow orders. That's what I meant. I have no concern that Judge Brinkema can't control her courtroom. That wasn't the issue.

THE COURT: And I'm sure court security officers like the one sitting here could, too.

MS. DICKINSON: As well. So no offense to any of the security in here or to Judge Brinkema --

THE COURT: Yeah.

MS. DICKINSON: -- but what I really meant was that Joe Loomis has forfeited his right to try this case in front of a jury or a judge, because he has violated the Court's orders and because he has tampered with witnesses and destroyed a whole host of evidence, but I have some specific responses, if I may --

THE COURT: Sure.

MS. DICKINSON: -- to my colleague here.

Mr. McEvoy and I have a little bit of a difference of opinion as to whether we were going to bring to the Court's

attention the fact that the bankruptcy folks are going to be potentially having a meeting next week.

THE COURT: Oh, I wasn't sure who was meeting next week. It's the bankruptcy that may have a meeting next week?

MS. DICKINSON: Yes.

THE COURT: The bankruptcy attorneys are tangentially involved in the bankruptcy, I guess.

MS. DICKINSON: Yes, Your Honor. I just want to make sure that it's clear to the Court that we want a decision on these issues, on these orders. We are not here asking you to listen to us and then to hold -- or to put the brakes on until maybe somebody else sits in at chambers like we did and tries to map out a settlement that may or may not go through. We very much want this Court's opinion.

THE COURT: Okay. I'm glad you made that clear.

MS. DICKINSON: As far as the individual issues that -- Mr. McEvoy made a few of them. As far as our knowledge of the spoliation goes, we did not know about the fate of that desktop computer that was in his office that he had his brother take a few days -- a week, I guess, after he was suspended, we did not know about the fate of the two laptops, the one that he wiped clean right after he was suspended and the other one that he wiped clean during discovery, until discovery.

Now, there is a, a draft memo from Madalyn Behneman that is an exhibit, and she says -- it's dated March 9, 2009. She says

that the company believes that their process to grab back the network data that Mr. Loomis had tried to destroy was effective in capturing all of the available e-mails and network files.

Now, Your Honor made the right point, I believe, that that was talking about network data and that there could have and indeed I think everybody's pretty confident that there was based on Joe Loomis's conduct in his statements to Matt Leberer, other data on the desktop computer that had two hard drives, the laptop computer that he wiped clean right after he was suspended, and the other one that he wiped clean in August of 2009. We certainly didn't know about the destruction of the data in those computers when she wrote this memo, so this memo is just irrelevant on that point.

As for the timing of our motion, Judge Brinkema told us to file this motion before trial. She told us that during the, I think it was December 15th-ish, 14th -- 17th, sorry, my dates are off -- pretrial conference. We did that in plenty of time for this Court to decide it before the hearing. There's no prejudice.

As this, this Court pointed out, there was a long history of talks between the parties about whether data had been destroyed or not since the beginning of discovery. He -- Joe Loomis had ample opportunity to ask in depositions questions about the destruction of evidence, and in fact, he did do that. There were 20 or so depositions in this case, and I can think off the top of my head of at least two individuals that he asked questions

of, and they cite to, to one of the depositions, Jason Wood, where they asked questions about that. So there's no prejudice there, Your Honor.

As far as the, the deposition -- or, I'm sorry, the declaration of Matt Leberer, we produced that in discovery within, I guess, a week and a half/two weeks of that being obtained. Again, no prejudice.

I, I take some issue with the downplaying of what happened before the protective order was issued. There, there's a lot of effort, it seems, by Mr. Loomis to push off the responsibility for what happened, for the conduct that caused the protective order to be issued, and lest everybody forgets, and not to personalize this, but Joe Loomis sent me an e-mail. That's in the record. He sent me an e-mail personally where he forwarded an e-mail to his counsel saying, I don't know it verbatim, but the idea was I've hired or I'm about to hire criminal counsel, and a complaint will be filed -- a criminal complaint will be filed against Dickinson and Intersections something like within the next couple of days.

He e-mailed me directly. Joe Loomis -- it's not just HHY, the Arizona attorneys, who were doing harassment in this case that caused the protective order to be issued. We need not -- we should not forget that.

As far as this declaration of Zack Gilburd that I just skimmed real quick, Zack Gilburd in paragraph 3 says that he set

up this SVN server so that -- he says that Joseph Loomis requested that I create a batch file or script that would automatically commit selected files and folders on his computer to the SVN server -- and I'm going to paraphrase a little bit -- so that when the computer was paired up, it would sync, commit, and refresh the SVN folders residing on the computer with the SVN server with NEI's IT infrastructure.

What's key to me when I look at that is "selected files and folders." Even this gentleman here, Mr. Gilburd, does not testify or declare under perjury that Joe Loomis was backing up all of his files, and if there is any question about that at all, in interrogatory No. 16 -- and I have a copy for you if you'd like one, Your Honor, but I suspect you don't --

THE COURT: Do you have it as an exhibit?

MS. DICKINSON: I do.

THE COURT: Oh, you have it, okay.

MS. DICKINSON: It is an exhibit already, but I can give it to you if you'd like to look at it.

THE COURT: It might be easier rather than me trying to dig through.

MS. DICKINSON: I'm just going to flip it open so it will be easier.

MR. McEVOY: Your Honor, I can, I can hand Mr. Tolliver --

MS. DICKINSON: I've got it, thanks.

THE COURT: I've got it. Thank you.

MS. DICKINSON: So, Your Honor, what I've, I've handed you -- or -- thank you -- has been handed to you is a copy of defendant Joseph C. Loomis's responses to plaintiff Intersections, Intersections Inc.'s first set of interrogatories, and as you'll see --

THE COURT: Oh, yeah, I see, the first paragraph.

MS. DICKINSON: Yeah, right. And he -- right. He says, "These files were not stored on NEI's server, only on my personal computer."

THE COURT: Um-hum. Okay.

MS. DICKINSON: So that right there shows that Joe Loomis was not storing everything on the SVN server automatically or otherwise, as, as he suggests, as he would like this Court to believe.

THE COURT: Okay.

MS. DICKINSON: And those are sworn to the extent he wants to try to walk away from them.

With respect to the protective order, Joe Loomis violated the protective order. He didn't have to run around and meet with all of our witnesses. It could have been one meeting with a witness, and that would have violated the protective order, but the fact is that he has established a relationship with one of our witnesses who he was prohibited from contacting and, and he has sought to contact. He has contacted by e-mail and text

another one of our witnesses, but I think that, that -- I'm not sure where is the outrage?

Joe Loomis entered into indemnity agreements with these folks. He signed them, and what, and what he basically said was you -- he wasn't trying to level the playing field. Joe Loomis doesn't try to level the playing field. He was saying: It's okay, you guys. You don't have to contact Michelle Dickinson, and that's what it says in the papers.

So if he's not contacting me, I'm the lead counsel on this case, then how are we going to use him as a witness, and how are we going to use Sheila as a witness if they're no longer going to contact us? That was the purpose of the indemnity agreement.

Mr. Hazard, very well respected, I'm sure, I respect his opinion except that his opinion is about something else. His, his opinion about this, this indemnity agreement is that it was okay for Emil Herich to enter into an indemnity agreement with witnesses.

Well, that's not what happened here. Joe Loomis, that guy who wasn't supposed to be contacting witnesses, he entered into an indemnity agreement with these guys. He entered into an indemnity agreement with two people who have been so afraid of him that they've gone to the court in the past and gotten restraining orders against him. I'm not sure, but I don't think that Mr. Hazard would think that was okay.

Now, Your Honor, this Court may decide that the

protective order needs to be modified. That's not going to change the enforceability of the protective order. The Court could add to the four corners of the document the reasons that the protective order was issued. The Court could clarify that plaintiffs' witnesses meant current and former employees since we didn't have witness lists out there yet, but that's not going to change Joe Loomis's conduct. It's not going to change the fact that he violated the protective order and that he should be sanctioned.

THE COURT: Okay.

MS. DICKINSON: Thank you.

THE COURT: Thank you.

All right, as I said, I'm going to have to issue a report and recommendation and take it under consideration. I, I can tell you right now it's not going to come out next week. I've got another big opinion that I'm trying to get out the door, and it's just not going to happen. It's going to be next in line.

So the earliest would be two weeks. It may be a little longer. It could be three weeks from now just so you know.

MR. McEVOY: Your Honor, I begged your indulgence enough today, and I appreciate it. Just may I say one thing?

THE COURT: Sure.

MR. McEVOY: The e-mail that was referenced, two things: I understand that the e-mail that was referenced about the threat to, quote-unquote, Dickinson may have been a Reply All to

whatever, whatever weight that may have with respect to the Court, and Mr. Leberer's declaration, I've looked -- I mean, if you guys produced it and there's a Bates number on it, I mean, I'll acknowledge that.

Leberer's deposition, I thought you said it was produced during discovery. I mean, if you have one with the Bates number, I can -- well, I'm just saying we can do this off the record, but I'll file something to say indeed we got it if we got it, but I don't think we did, but --

MS. DICKINSON: You got it.

MR. McEVOY: We don't have to argue about it. Just show me, and I'll acknowledge it.

All right, that's it, Your Honor. I appreciate it, and --

THE COURT: Okay.

MR. McEVOY: -- and I don't think anybody -- I don't think Professor Hazard, by the way, thought Mr. Herich was going to pay indemnity to anybody. I think it was obvious that it would be the client.

Thank you very much.

THE COURT: All right, thank you.

MS. DICKINSON: Oh, Your Honor, you just have to indulge me just one second, please. That e-mail, it was not a Reply All, all right? There's no way -- it was to his counsel. How would he ever have my e-mail address on -- it just doesn't make any sense.

It was not a Reply All.

THE COURT: Okay. Court stands in recess.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE TRANSCRIBER

I certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/
Anneliese J. Thomson